Case Number: 3324263/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J E Purser	v	Arena Security Limited

Heard at: Watford **On**: 19 August 2020

Before: Employment Judge Hyams, sitting alone

Appearances:

For the Claimant: In person
For the Respondent: Mr Graham Bethel, Managing Director

JUDGMENT

None of the claimant's claims has a reasonable prospect of success. They are accordingly all struck out under rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013.

REASONS

The claims; a preliminary time issue

1 The hearing of 19 August 2020 was listed on the direction of Employment Judge Laidler, to "determine whether any/all of the claims should be struck out and/or a deposit ordered". The claims are of unfair dismissal and of breach of contract. The claim of unfair dismissal was capable of succeeding only if the claimant could satisfy the tribunal which heard his claim that he had been dismissed "constructively", i.e. within the meaning of section 95(1)(c) of the Employment Rights Act 1996 ("ERA 1996"). The claims were made against both the claimant's employer and a manager of the claimant's employer in person. Given that a claim to an employment tribunal of unfair dismissal and of breach of contract can be

made only against an employer, the claim was accepted only against the claimant's former employer, which is named as the respondent above, and is referred to below as the only respondent.

2 The claimant's claims were stated by him by hand in an ET1 claim form which was presented to the tribunal, i.e. actually received by the tribunal, on 23 September 2019. That form was sent to the tribunal by post. (That was stated in the file, and the claimant confirmed it at the hearing of 19 August 2020.) It was signed by the claimant on 19 September 2019.

3 The claimant terminated his employment by a letter dated 25 April 2019 which was sent to the respondent by (the claimant told me) first class post. The letter did not say whether or not the claimant was terminating his employment with immediate effect or on notice. It merely stated that the claimant was giving in it "formal notice of my termination of my employment contract with Arena Security Limited". The ET3 form stated that the claimant's contract of employment required him to give two weeks' notice. The claimant had stated in his ET1 form that his employment had ended on 15 May 2019. That was probably because the respondent had (I could see from a letter of which a copy was put before me) purported to accept the claimant's resignation on 15 May 2019. In the ET3, it was asserted that the claimant's employment had ended on 25 April 2019.

4 In the circumstances, the claimant's employment could have ended within 2 weeks of the receipt by the respondent of the claimant's letter of 25 April 2019, or it could have ended on the day when that letter was received. There is no need to accept a resignation which is in a letter giving proper notice. The day after 25 April 2019 was a Friday. Mr Bethel told me that post received on a Saturday by the respondent is not seen until the following Monday. Thus, the date of the termination of the claimant's employment was (1) 26 or 29 April 2019, (2) 10 May 2019, or (3) 15 May 2019.

5 The early conciliation certificate stated that the claimant had initiated the early conciliation period by notifying ACAS on 23 July 2019 and that the date of the issue of the early conciliation certificate was 22 August 2019. Accordingly, the claimant was unable to take advantage of section 207B(4) of the ERA 1996: the claim was made more than a month after Day B within the meaning of that subsection. While the period from 24 July 2019 to 22 August 2019 had to be ignored for the purposes of limitation, even if the claimant's claimed date of the termination of his contract of employment (15 May 2019) had been correct, the claim was made more than three months (ignoring the period from 24 July to 22 August 2019) after the claimant's dismissal. That three-month period (as so extended) ended on (by my calculations) 13 September 2019. Even if one added two days to allow for the delivery by the Royal Mail of the respondent's letter of 15 May 2019 accepting the claimant's resignation, that meant that the primary time limit ended on 15 September 2019, and the claimant had presented his claim on 23 September 2019. Thus, if the claim had survived the hearing before me on 19 August 2020, I would have listed it for a further preliminary hearing, to decide whether it was reasonably practicable for the claimant to make his claim within the

primary time limit of three months, extended as necessary by the early conciliation period from 24 July to 22 August 2019 inclusive and, if it was not, whether it was made within a reasonable period of time after the expiry of the period of limitation.

6 However, that issue did not arise for determination given my conclusion that none of the claims had a reasonable prospect of success. I arrived at that conclusion for the following reasons.

The claims

7 The claimant had ticked the box on the ET1 form for unfair dismissal "(including constructive dismissal)". He had then not stated in terms that he had resigned in response to the respondent's conduct, but in the circumstances I assumed that it could properly be inferred that he had done so.

8 The claimant had stated four claims in box 2 of the claim form, i.e. page 7 of the claim form. He had done so in handwriting which was in some parts difficult to read, and he had extended his statement of the claims by writing by hand on two further pages with the same box 2 on it (i.e. so that there were three pages numbered 7 in the ET1 that was presented on 23 September 2019) and then concluding the handwritten description of the claims on a second page 8.

The first claim

9 The claimant was employed by the respondent as a security guard. The claimant's "first claim" was of the removal of an "attendance allowance". During the hearing before me, the claimant said that that was an allowance of £15 per week. The ET3 form had been completed by a firm of solicitors and was accompanied by a document entitled the respondent's "Grounds of Resistance (Defence)". I refer to them below as the respondent's Defence. In paragraphs 10-12 of the Defence, it was said that the attendance allowance had been replaced by an increase in the hourly rate of pay of £0.50, which had been implemented in or around February 2015. The claimant confirmed to me at the hearing of 19 August 2019 that he had indeed received an increase in his hourly rate of pay when the attendance allowance was removed, although he called it an increase of "pennies". He accepted that he had worked for 34 hours per week. While the claimant referred in the ET1 to the change having been the subject of a complaint made by him in 2017 to the respondent, the claimant referred to that change as having been made "by management approximately two years" before he sent a letter to the respondent about it on 16 November 2017 (of which I was given a copy), after which he received a letter from the respondent dated 20 November 2017 in reply (of which I was also given a copy).

The second claim

10 The claimant's "second claim" was this: "when I made a telephone call to Arena Security Limited in October 2012 Steve Gibbson and Graham Blunt then

demanded my resignation" after which, it is the claimant's case, he wrote to them about the matter and they ignored his correspondence on the matter.

The third claim

11 The claimant's "third claim" was "with regard to the prevention of me attending my duty of work on Sunday night being the 10th December 2017 when I was waiting and willing to be given a lift into work as my own car some days ago had broken down on the work to work".

12 The claimant accepted that he had no contractual right to a lift to work, and that he was paid for the session that he was not picked up to do.

The fourth claim

13 The claimant's "fourth claim" was "that of an obstruction to hinder me in an initial attempt to return to work" and in the ET1 form the claimant asked the tribunal to review the correspondence from Mr Bethel to him of 6 March 2019, his (the claimant's) responses of 13 and 26 March 2019, and Mr Bethel's written response of 27 March 2019 to those letters. That Defence responded to that part of the claim without referring to those letters. I therefore asked to see them, and Mr Bethel gave me copies of them. I read them during the hearing and took copies of them after the hearing had ended. The letters from Mr Bethel to the claimant were the critical documents, as the claimant was relying on those letters in claiming that his contract of employment (or another contract connected with his employment) had been breached. Mr Bethel's letters of 6 and 27 March 2019 among other things referred to the "SIA", which is short for "Security Industry Authority", and were in the following terms respectively:

> <u>The letter of 6 March 2019</u>
>
> "Further to our recent telephone conversation.
>
> I am pleased to hear that your health is improving. The procedure for returning to work is as follows: Once you and your own doctor feels that you are fit for work he/she will issue you with a fit to work certificate.
>
> At that stage we will arrange for you to have an Occupational Health assessment by an independent doctor. We might make adjustments to your working conditions as recommended by the assessing doctor. These adjustments could include but not be limited to allocating you to an assignment whereby you work alongside other employees, or an assignment requiring shorter hours of work.
>
> I note that your SIA licence has expired so please note that you will be required to make the necessary arrangements to be in possession of a current SIA licence before you return to work.

You have stated that you could not find my previous letter to you dated 1th [sic] June 2018. I enclose a copy of that letter plus a blank copy of the Department of Work and Pensions form as discussed on the telephone.

I look forward to hearing from you once you are ready to return to work."

The letter of 27 March 2019

"Further to your letters dated 13th and 26th March.

The SIA licencing department have changed their procedures, the employer could previously complete applications on behalf of employees, but we can no longer do this.

Employees must now set up their own on-line account with the SIA personally.

I am sorry to hear that you and your doctor do not feel that you are fit to return to work, do let me know if and when the situation changes at any time.

With regard to your suggestion to pay you 37 hours for each week you have been off sick, I am afraid that I can not agree to your request.

In line with our legal responsibility and your contract of employment, we pay statutory sick pay only."

The circumstances in which the claimant resigned

14 The claimant's last day when he was ready and willing to work was 10 December 2017. He had since then been absent from work because of ill-health, which he claimed was caused by stress, which he attributed to his employment. The claimant's final letter to the respondent before he wrote his letter of 25 April 2019 giving notice was his letter of 26 March 2019, to which Mr Bethel responded in the letter set out immediately above. With that letter of 26 March 2019, the claimant enclosed a certificate of "Fitness for Work" from his doctor, dated 27 February 2019 and stating that he (the claimant) was "not fit for work" because of "Stress at Work", and that that would be the case from 27 February 2019 to 28 April 2019, after which the doctor would "not need to assess [the claimant's] fitness for work again at the end of this period." In other words, the claimant was absent from work because of sickness and was going to be so for the foreseeable future at that time.

The applicable law

15 The law that I had to apply was both substantive and procedural. The claim of unfair dismissal relied on the law relating to "constructive" dismissal, i.e. a dismissal within the meaning of section 95(1)(c) of the ERA 1996, which includes elements of the law of contract. The contract claims were made under article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order

1994, SI 1994/1623 (as amended) ("the 1994 Order"), read with section 131(2) of the Employment Protection (Consolidation) Act 1978. The question whether the claims should be struck out on the basis that they had no reasonable prospect of success was the subject of a considerable body of case law. I now turn to those three areas of the law.

The law of constructive dismissal and the law of contract

16 As I said during the hearing of 19 August 2020, the claimant plainly relied here on the implied term of trust and confidence. That is an obligation not, without reasonable and proper cause, to act in a way which is likely seriously to damage or to destroy the relationship of trust and confidence which exists, or should exist, between employer and employee as employer and employee. The question whether that term has been breached is determined objectively: see *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481. A breach of that term is (as was confirmed in *Omilaju)* a repudiation or fundamental breach of the contract of employment.

17 The law of constructive dismissal was clarified particularly helpfully by Lord Denning MR in *Western Excavating v Sharp* [1978] ICR 761, at page 769A-C:

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

18 The question whether an employee can rely on a breach of the implied term of trust and confidence after which the employee has affirmed the contract of employment is the subject of some recent helpful clarification. In fact, the position has been reasonably clear since the decision of the Court of Appeal in *Lewis v Motorworld Garages Limited* [1986] ICR 157, but the decision of the Court of Appeal in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978 put the effect of the decision in *Lewis v Motorworld Garages* beyond doubt and helpfully clarified the way in which a claim of constructive dismissal must be approached. The whole of the judgment of Underhill LJ (with which Singh LJ, the only other member of the court, agreed) in *Kaur* is helpful, but here I simply set out the main part of paragraph 55, which is in these terms:

'In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju [2005] ICR 481) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) [Underhill LJ's footnote: I have included "repudiatory" in the interest of clarity, but in fact a breach of the trust and confidence term is of its nature repudiatory: see per para 14(3) of Dyson LJ s judgment in *Omilaju* [2005] ICR 481.] breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.'

19 As for affirmation of a contractual change which is imposed by an employer, in *Abrahall v Nottingham City Council* [2018] EWCA Civ 796, [2018] IRLR 628, the Court of Appeal decided, as it is said in the headnote to the latter report:

"Sometimes pay-cuts are proposed as part of a package of measures some of which are (at least arguably) to the employees' benefit. If the employees continue to work without protest following implementation, taking the good parts as well as the bad, it is usually easy to infer that they have accepted the package in its entirety."

20 That statement of principle is taken from the judgment of Underhill LJ, with which Sir Patrick Elias and Ryder LJ (Senior President of Tribunals) agreed. Sir Patrick Elias added this, in paragraph 107:

"In practice employees will often agree to a variation by conduct. This will readily be inferred, for example, where the change is to the employee's benefit, such as where he is given a pay increase. Unless the contract is wholly exceptional, he will not have expressly to confirm acceptance before the increase takes effect: see *Attrill v Dresdner Kleinwort Ltd* [2013] EWCA Civ 394, [2013] IRLR 548, paras [97]–[98]. Similarly, if he is promoted, is given

a new contract and acts in accordance with its terms, he will be deemed to have accepted the whole of the terms, and that is so even though the new contract may contain certain disadvantageous provisions and even though they do not immediately bite: see *FH Farnsworth Ltd v Lacy* [2012] EWCA 2830 (Ch), [2013] IRLR 198, where an employee was treated as having agreed to the imposition of a restrictive covenant on this basis."

Contract claims made to an employment tribunal

21 Article 3 of the 1994 Order provides:

"Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;

(b) the claim is not one to which article 5 applies; and

(c) the claim arises or is outstanding on the termination of the employee's employment."

22 Article 5 of the 1994 Order is irrelevant. Section 131(2) of the 1978 Act (i.e. the Employment Protection (Consolidation) Act 1978) provides:

"(2) Subject to subsection (3), this section applies to any of the following claims, that is to say—

(a) a claim for damages for breach of a contract of employment or any other contract connected with employment ;

(b) a claim for a sum due under such a contract;

(c) a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract;

being in each case a claim such that a court in England and Wales or Scotland, as the case may be, would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim."

The law relating to striking out

23 In deciding whether or not the claimant's claims should be struck out, I applied a test which was as favourable to the claimant here as any of those which are usually applied in deciding whether to strike out claims to an employment tribunal.

That is the test applicable to cases to which rule 24.2(a) of the Civil Procedure Rules 1998 ("CPR") applies. That provision empowers a court to give summary judgment (which is in substance what happens when a case before an employment tribunal is struck out because of a lack of a reasonable prospect of success) where there is "no real prospect" of success. The leading case on the application of rule 24.2(a) is the decision of the House of Lords in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1. There, at page 260, in paragraph 93, Lord Hope set out the following key passage from Lord Woolf's judgment in *Swain v Hillman* [2001] 1 All ER 91, which concerned rule 24.2(a):

> "It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible ... Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

24 In paragraphs 94 and 95 of his speech in *Three Rivers*, at 260-261, Lord Hope said this:

> "**94** ... I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is – what is to be the scope of that inquiry?
>
> **95** I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the

> documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

25 The decision on the facts before the Court of Appeal in *Swain v Hillman* is instructive. There, Lord Woolf said (at p 93e) that it was:

> "fair ... to take the view that the judge regarded this as a case where he thought that it was possible, but improbable, that the claim or defence would succeed."

26 I see no material difference between the tests in CPR r 24.2(a) and that which is in rule 37, namely whether or not a case has "no reasonable prospect of success". Even if there is a minor such difference, I see it as being possible accurately to say that while it may be improbable that a claim will succeed it may at the same time be incapable of being characterised as a claim which has no reasonable prospect of success. There is a considerable gap between a claim that has a reasonable prospect of success and a claim that has no reasonable prospect of success. The latter is a fanciful claim. The former is a substantial one. A claim which it is improbable will succeed but which might do so (i.e. it is possible will succeed) is not one which has "no reasonable prospect of success" and therefore such a claim should not be struck out by an employment tribunal Such a claim falls within the gap between a claim which is fanciful and one which has a reasonable prospect of success, even though the line between an improbable claim and a fanciful one is thin.

My conclusions on the question whether any of the claims had a reasonable prospect of success, and my reasons for those conclusions

The claim of unfair dismissal

27 Despite the strictness and severity of the test for determining whether a claim has a reasonable prospect of success, I could see nothing which, viewed objectively in the light of the case law to which I refer above, justified the claimant's claim (taking it at its highest, i.e. assuming that it was well-founded on the facts as claimed by the claimant) that there had been a breach of the implied term of trust and confidence. That is for the following reasons.

27.1 The claimant's "first claim" was plainly not well-founded: it was a claim to be paid an attendance allowance of £15 per week when, as the claimant accepted, he had been paid £0.50 per hour more than he had been previously, and he worked 34 hours per week, so that when his attendance was full (as it was plainly required to be before he was entitled to the £15 payment) he was paid £17 per week more after the pay rise than before it. In any event, the change was imposed in 2015, and the

claimant had therefore (applying *Abrahall*) plainly affirmed the contract by accepting the increased hourly rate.

27.2 The claimant's "second claim", namely of a breach of the implied term of trust and confidence by reason of being asked to resign, was about an event which occurred more than six years before the claimant's resignation. He had therefore affirmed the contract and could rely on that claimed breach of the implied term of trust and confidence only if it formed part of an accumulation which, together, amounted to a breach of that term and he resigned (even if only in part) in response to that accumulation.

27.3 The claimant's "third claim" concerned a failure by the respondent to have the claimant picked up to be taken to his intended workplace on Sunday 10 December 2017, when there was no contractual obligation on the respondent to transport the claimant to work, and the claimant was paid for that session despite not being able to attend it because (a) his own car had broken down at the time and (b) the respondent did not pick him up. There was nothing wrongful in that circumstance. I note here, however, that if I had concluded that there had been anything wrongful, then I would have concluded that it was not a breach of the implied term of trust and confidence in its own right, but was capable at best of contributing to an accumulation of conduct which, taken together, amounted to a breach of that term. I should say that if the conduct had been capable of amounting to such a breach, then, given the claimant's illness since that day, I would have been willing to conclude that the claimant had not affirmed the contract by his delay in claiming to have been dismissed constructively.

27.4 The final event on which the claimant relied, his "fourth claim", was of wrongdoing by the respondent in its failure to help him to apply for an SIA licence, and (1) I did not see it as being in any way wrongful to say what was said in Mr Bethel's letters of 6 and 27 March 2019 which I have set out in paragraph 13 above, and (2) I could see no justification for the assertion that it would be a breach of the implied term of trust and confidence to fail to assist the claimant to apply for an SIA licence in the circumstance that the claimant was at the time of the writing of those letters absent from work on account of sickness and was not going to be well enough to return to work for the foreseeable future.

28 In the circumstances it was in my judgment fanciful to suggest that there had been an accumulation of conduct which, taken together, amounted to a breach of the implied term of trust and confidence, in response to which the claimant was entitled to, and did, resign. That meant that the claim of unfair dismissal had no reasonable prospect of success and had to be struck out.

29 As for the individual claims of breach of contract, given what I say in paragraph 27 above, I had to conclude that none of them had a reasonable prospect of success. In any event, each of the second to fourth claims was incapable of being relied on

as a claim in its own right: they were all capable of being relied on only as part of an accumulation of conduct which, taken together, amounted to a breach of the implied term of trust and confidence. The first claim had no reasonable prospect of success because in my judgment if (which I could not see) there had been anything negative in the circumstances as far as the claimant was concerned, it was in my view clear that he had affirmed the contract by accepting the increased hourly rate of pay. However, in my view there was nothing negative as far as the claimant was concerned in the change which the respondent had imposed in 2015.

30 As a result, all of the claimant's claims had to be struck out under rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013.

Employment Judge Hyams

Date: 25 August 2020

Sent to the parties on:16/09/2020

Jon Marlowe

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For the Tribunal Office